Supreme Court, U.S.
FILED

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No.

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SIDNEY C. LAUGHLIN, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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97 pp

QUESTION PRESENTED FOR REVIEW

I. When does a court's failure to instruct as to the intent element of an offense, as the Tenth Circuit Court of Appeals found with regard to fifty-three counts here, so affect the jury's consideration of the intent element of a second offense based upon the same factual allegations as to deny the defendant his right under the Fifth and Sixth Amendments to a jury trial on the essential elements of the second offense.

LIST OF PARTIES TO PROCEEDING

The following were all parties to the appeal before the United States Court of Appeals for the Tenth Circuit:

Sidney C. Laughlin - Petitioner

United States of America

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

Statement of Facts 4

Basis for Exercise of Jurisdiction by the Court of Appeals 11

REASONS FOR GRANTING THE WRIT OF CERTIORARI 13

ARGUMENT AND AUTHORITIES SUPPORTING REASONS FOR GRANTING THE WRIT OF CERTIORARI . . . 15

I. The usual test applicable to Constitutional error is whether the error is harmless. 15

II. Although the case law cited by the Tenth Circuit in support of its decision appears to apply the harmless error standard generally in evaluating constitutional error, the Tenth Circuit chose to apply a more lenient standard in this case. 20

III. Other Courts of Appeal have recognized the close factual and legal nexus between offenses such as mail fraud and conspiracy, and underlying crimes that provide evidence of those offenses. 21

CONCLUSION 24

APPENDIX A - Reported Opinion
United States v. Laughlin,
26 F.3d 1523 (10th Cir. 1994) 25

APPENDIX B - Judgment Entered
June 16, 1993 67

APPENDIX C - Excerpts from Transcript
District Court Rulings on Jury
Instructions 77

APPENDIX D - Excerpts from Indictment -
Counts 54, 55, 56, and 57 82

TABLE OF AUTHORITIES

Arizona v. Fulminante, 499 U.S. 279,
113 L.Ed.2d 302, 111 S.Ct 1246,
(1991), rehearing den. 500 U.S.
938 . . . . . 17, 18

Chapman v. California, 386 U.S. 18,
17 L.Ed.2d 705, 87 S.Ct. 824
(1967), rehearing den. 386 U.S.
987 16

Graves v. United States, 165 U.S. 323,
41 L.Ed. 732 (1897) 23

Sandstrom v. Montana, 442 U.S. 510,
61 L.Ed.2d 39, 99 S.Ct. 2450
(1979) 19

Stromberg v. California, 283 U.S. 359,
51 S.Ct. 532, 75 l.Ed. 1117
(1931) 19

United States v. Aguon, 851 F.2d 1158,
1169-70 (9th Cir. 1988) 22

United States v. Cardall, 885 F.2d 656
(10th Cir. 1989) 19, 20

United States v. Hasting, 461 U.S. 499, 76 L.Ed.2d 96, 103 S.Ct. 1974 (1983) 17

United States v. Laughlin, 26 F.3d 1523, (10th Cir. 1994) 1, 7, 11 20, 21

United States v. Levin, 973 F.2d 463, (6th Cir. 1992) 22, 23

Yates v. Evatt, 500 U.S. 391, 114 L.Ed.2d 432, 111 S.Ct. ___, (1991) 16, 17

Statutory and Constitutional Authority

United States Constitution, Amendment Five 2

United States Constitution, Amendment Six 2

18 U.S.C. § 1341 . . . . . 3, 4

28 U.S.C. § 1254(1) (1993) 2

28 U.S.C. §1291 12

42 U.S.C. § 1320a-7b(a)(1)(i) . . . 3, 4, 11

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IN THE
SUPREME COURT OF THE UNITED
OCTOBER TERM, 1994

No. _____

SIDNEY C. LAUGHLIN, Petitioner,

V.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *United States v. Laughlin*, 26 F.3d 1523 (10th Cir. 1994). (Appendix A). The June 16, 1993 judgment of the district court appears as Appendix B to this petition. The specific ruling of the district court with regard to the intent instructions at issue appears as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 16, 1994. This petition for certiorari is filed within ninety days of final judgment pursuant to Rule 13 of the Rules for the Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life liberty or property without due process of law; . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

Section 1320a-7b(a)(1)(i) of Title 42 of the United States Code provides in pertinent part:

> Whoever -
>
> > knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a State health care program . . .
> >
> > shall (i) in the case of such a statement, [or] representation . . . by any person in connection with furnishing (by that person) of items or services for which payment is or may be made under the program, be guilty of a felony . . .

Section 1341 of Title 18 of the United States Code provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both. . .

STATEMENT OF THE CASE

Statement of Facts

On July 9, 1992, the petitioner was charged by Grand Jury Indictment with fifty-three counts of Medicaid fraud under 42 U.S.C. § 1320a-7b(a)(1)(i). In addition the petitioner was charged with four counts of mail fraud under 18 U.S.C. § 1341. The indictment was filed in the United States District Court for the Western District of Oklahoma.

According to the indictment, the basis for the fifty-three counts of Medicaid fraud rested on allegations of several different groups of false statements placed on Medicaid claim forms by the petitioner. Included were allegations that the petitioner misused the term "accident in home" on claim forms to

obtain compensation for otherwise non-compensable medical procedures, billed the Medicaid program for ultrasound procedures that were not covered under the Program guidelines, and submitted claims to Medicaid for procedures that were not performed or were otherwise not compensable under the program.

The four counts of mail fraud (counts 54 through 57) were based exclusively on the same factual allegations as the fifty-three counts of Medicaid fraud,[1] with the two exceptions

---

[1] Count 54 realleged and incorporated the preceding counts in the indictment and alleged that the substance of the scheme and artifice to defraud included the following (listed in the same order as in the indictment):

a) the misuse of the term "accident in home," b) charging for services on dates on which they were not performed, use of multiple dates on claim forms in order to secure payment for services that would not all be compensable if performed on the same date, d) billing for global procedures when not permitted by the regulations, e) the allegation of a delayed tubal ligation, f) mailing applications individually rather than

that the mail fraud counts also included an allegation that the petitioner delayed performing a tubal ligation on a patient by four weeks instead of performing it simultaneously with a Cesarean section in order to collect for both the tubal ligation and the Cesarean procedure, and an allegation that the petitioner mailed claims separately rather than in bulk in order to conceal the alleged scheme.

At trial on October 22-29, 1993, the petitioner was convicted on fifty-two out of fifty-three counts of Medicaid fraud and on all four counts of mail fraud. In giving instructions to the jury on the Medicaid fraud

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in bulk to conceal the alleged scheme.

All factual allegations except (e) and (f) were identical to those supporting the allegations of Medicaid fraud. Counts 55 through 57 simply realleged the same factual scheme as count 54. A complete copy of counts 54 through 57 is attached as Appendix D.

counts, however, the District Court failed to give an instruction on the requisite intent necessary to commit the crime. The United States Court of Appeals for the Tenth Circuit subsequently reversed and remanded for new trial the petitioner's convictions on all fifty-two counts of Medicaid fraud. The Court of Appeals held that:

> . . . An analysis of the instructions in the form given convinces us that the jury could seriously have been misled in its understanding of the issues and law applicable to the case before it.

United States v. Laughlin, 26 F.3d 1523, 1528 (10th Cir. 1994) (see Appendix A, page , infra.). The Court went on to state that:

> On this record, we cannot confidently know whether the jury convicted Dr. Laughlin for: (1) knowing that he was making or causing claims to be made, or (2) knowing that the claims he was making or causing to be made were, in fact, false. . .

Id. at 1528.

With regard to the mail fraud counts, the petitioner asserted that as a result of the failure of the District Court to instruct on intent with regard to the fifty-three counts of Medicaid fraud, taken together with the fact that the scheme to defraud alleged in conjunction with the mail fraud counts derived from the same facts and evidence, the Constitutional error in the Medicaid fraud instructions could not help but affect the jury's consideration of the mail fraud counts. Given the close interrelation between the two offenses, it was the petitioner's position that, having found Medicaid fraud without intent, there was a very real danger that the jury could have used this erroneous finding to support its finding of a fraudulent scheme to support the mail fraud convictions, thus bypassing the intent element in the mail fraud instructions. Additional factors cited by the

petitioner in support of this position included the statements of the prosecution in closing argument that the scheme to defraud alleged was dependent on the facts supporting counts one through fifty-three, together with the single additional factual allegation contained in paragraph (e) of count fifty-four.[2] Transcript of Trial at 763.

The Tenth Circuit, without reference to the factual basis asserted at trial as support

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[2] The exact prosecution statement was:

> Counts 54-57 are mail fraud counts. Fifty-four has a separate claim form. Fifty-five, fifty-six, and fifty-seven are based upon the mailing of claims included within 1-53. The scheme to defraud in this case depends on the various billing patterns and policies that were developed during the proof concerning counts 1-53 as well as count 54, the claim for count 54, which if you'll recall is Tammy Mannsfield.

Tr. at 763. The prosecution elicited testimony to the same effect from witness Jim Igo.

for the charges, and relying solely on the language of the jury instructions[3] and the

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[3] The Court of Appeals relied heavily on the trial court's instruction that:

> A separate crime is charged in each count of the indictment. Each crime charged and the evidence applicable to it should be considered separately, and the guilt or innocence of the defendant as to each count should be considered separately.
>
> The fact that you may find the defendant guilty or not guilty as to a crime charged in one count should not control your verdict with reference to the other counts.

Jury Instruction 5 filed July 9, 1994 in the United States District Court for the Western District of Oklahoma in case number CR 92-122C.

Notably, the trial court's instruction does not address a separation of the legal issues involved; rather it is limited to addressing evidentiary issues and the effect of a guilty verdict on one count on the final determination of guilt or innocence on another count. The instruction does not discuss any distinction between the legal elements of mail fraud and Medicaid fraud, nor does it discuss a situation where guilt on a count of Medicaid fraud is itself evidence of a scheme to defraud, as the case was presented here.

jury's ultimate acquittal of the petitioner on one count as evidence that the jury considered each count individually, found no prejudice relating to the Mail fraud counts resulting from the Court's error. *United States v. Laughlin*, 26 F.3d 1523, 1529-30 (10th Cir. 1994). In so doing, the Court of Appeals engaged in no analysis of the record of the proceedings as a whole, and did not address petitioner's arguments based on the factual nexus that existed between the offenses. It is from this ruling that petitioner requests relief.

Basis for Exercise of Jurisdiction by the Court of Appeals

Counsel for the petitioner properly objected to the Trial Court's jury instructions on the intent element of 42 U.S.C. § 1320a-7b. Included in counsel's request was a request for an instruction

requiring proof that petitioner acted "knowingly and with specific intent to deceive." Tr at 759. Counsel's argument before the District Court and the Court's ruling are included as Appendix C. This instruction would have cured the District Court's failure to include an instruction requiring a finding by the jury that the petitioner knew the statements made on Medicaid claim forms were false, and thereby would have resolved any resulting prejudice with regard to the mail fraud counts.

The petitioner timely filed his notice of appeal to the Tenth Circuit on February 5, 1993, the same date on which judgment was entered. Appeal was brought as a matter of right pursuant to 28 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The issue of whether harmless error analysis applies to evaluation of the effect of constitutional error relating specifically and directly to some, but not all, charges being tried in a single proceeding on those charges to which it does not specifically relate is unsettled, and is a matter in which, as this case shows, application of an established standard has eluded Courts of Appeal in practice. In order to address concerns of due process and the right of defendants to a jury trial, this Court should review this case in order to make clear the applicability of Constitutional standards of review to the effect of error <u>on the entire trial proceeding</u> regardless of the direct relationship of the error to certain of the specific crimes with which the defendant is charged.

2. The Tenth Circuit's holding is in conflict with established precedent in the Ninth Circuit recognizing the "spill-over" impact of a court's failure to give correct intent instructions with regard to one charge on the jury's consideration of other charges deriving from the same operative facts.

3. The Court of Appeals for the Tenth Circuit has failed to follow both its own standard and the standard established by this Court in determining whether the petitioner was prejudiced by constitutional error. The Court did not consider the record as a whole in evaluating the effect of the erroneous jury instructions on the mail fraud counts, choosing instead to rely solely on an isolated analysis of the jury instructions themselves.

ARGUMENT AND AUTHORITIES SUPPORTING REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The usual test applicable to Constitutional error is whether the error is harmless.

The petitioner submits that there should be no distinction with regard to the standard of review that should apply to determine the effect of a constitutional error on the jury's consideration of the crime to which the error directly applies, and consideration of crimes tried in the same proceeding that could be affected by that error because of a "spill-over" effect on the jury's deliberations. Although the result may often differ upon review of the record as a whole, this potential for prejudice resulting from error deserves the same careful scrutiny given to the charges directly affected. Further where there is a factual and legal nexus between the offenses charged, the existence of a "spill-over" from the jury's consideration of one

charge to the other is not only a reasonable conclusion, but a probable one.

In cases in which error of constitutional dimension has been found, particularly with regard to the conduct of a trial proceeding itself, this Court has repeatedly held that in determining the effect of that error on the defendant's right to a fair trial, the reviewing court should apply "harmless error" analysis. This has held true in cases relating to instructions to juries indicating that they could draw adverse inferences from a defendant's failure to testify, *See Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967); cases in which jury instructions unconstitutionally shifted the burden of proof to a defendant or imposed an unconstitutional presumption against the defendant, *Yates v. Evatt*, 500 U.S. 391, 114 L.Ed.2d 432, 111 S.Ct. ___, (1991); and cases

where a coerced confession has been admitted into evidence, *Arizona v. Fulminante*, 499 U.S. 279, 113 L.Ed.2d 302, 111 S.Ct 1246 (1991).

In application, harmless error analysis mandates "consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." *United States v. Hasting*, 461 U.S. 499, 509, n 7, 76 L.Ed.2d 96, 103 S.Ct. 1974 (1983). In *Yates v. Evatt*, this analysis was further refined to require a determination of what part of the record the jury, as reasonable persons, would have considered in light of the nature of the error, and then requiring review of that part of the record only. *Yates*, 114 L.Ed.2d at 450. In Yates the Court recognized that:

> This point must always be kept in mind when reviewing erroneous presumptions for harmless error, because the terms of some presumptions so narrow the jury's focus as to leave it questionable

> that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed.

Yates, 114 L.Ed.2d at 450.

In reviewing the effect of error on jury determinations, the Court has also indicated that the issue is the possibility for predjudice, not whether the jury actually acted incorrectly. In *Arizona v. Fulminante*, in analyzing the effect of coerced confession, the Court stated that "it is clear that the jury might have believed that the two confessions reinforced and corroborated each other." *Fulminante*, 499 U.S. at 299, 113 L.Ed.2d at 325, [emphasis added]. Also, "the jurors could also have believed that Donna Sarivola had a motive to lie about the confession in order to assist her husband. *Fulminante*, 499 U.S. at 300, 113 L.Ed.2d at 325, [emphasis added]. This analysis is consistent with the rule established in

Sandstrom v. Montana, 442 U.S. 510, 526, 61 L.Ed.2d 39,52, 99 S.Ct. 2450 (1979), that "even if a jury could have ignored the presumption [as to wrongful intent] and found the defendant guilty because he acted knowingly, we cannot be certain that this is what they did do." [emphasis added].[4]

II. Although the case law cited by the Tenth Circuit in support of its decision appears to apply the harmless error standard generally in evaluating constitutional error, the Tenth Circuit chose to apply a more lenient standard in this case.

The Court of Appeals cited *United States v. Cardall*, 885 F.2d 656 (10th Cir. 1989) as the basis for its review of the spill-over effect of the incorrect jury instructions. Cardall appears to require the same analysis

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[4] *See also, Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 l.Ed. 1117 (1931) (holding that where there is doubt as to whether a conviction is predicated on an impermissable ground, that doubt must be resolved in favor of the defendant and the conviction vacated).

proposed by petitioner here; i.e. a review in light of the record as a whole, in the context of the total trial, in order to determine the potential effect of jury instructions on the jury's deliberations. *Cardall* at 673. Indeed, this is the type of analysis that was applied to the Medicaid fraud counts that were reversed. With regard to those counts, the Court of Appeals stated:

> . . . the jury could seriously have been misled in its understanding of the issues and law applicable to the case before it.

United States v. Laughlin at 1528.

This was not however the analysis applied to the potential spill-over effect of the erroneous instructions. The Court of Appeals instead, based solely on its review of the instructions themselves, concluded in cursory fashion that:

> We do not believe that the absence of an element in the medicaid fraud instructions induced the jurors to

> abandon the independent and adequate mail fraud instructions they received.

Laughlin at 1529. The Court made a conclusive determination as to the jury's state of mind, a determination the Sandstrom court held was impossible to make, (see discussion on page 21, supra.), and did so without reference to the record as a whole and without any analysis of that record.

III. Other Courts of Appeal have recognized the close factual and legal nexus between offenses such as mail fraud and conspiracy, and underlying crimes that provide evidence of those offenses.

Mail fraud and conspiracy are similar offenses in the sense that both rely on proof of some underlying scheme or overt act for conviction. Other courts have recognized the close connections between crimes of this type and crimes that can be used as proof of the underlying scheme or overt act, as well as the effect of error with regard to the underlying

criminal act on the jury's consideration of the mail fraud or conspiracy charge.

In *United States v. Aguon*, 851 F.2d 1158, 1169-70 (9th Cir. 1988) the Court of Appeals for the Ninth Circuit held, without application of any ascertainable standard, that:

> . . . as the jury had been erroneously instructed on the crime of extortion, there was substantial prejudice to the defendant on the charge of conspiracy to extort--prejudice that spilled over from the instruction on extortion. Believing that it could convict on extortion without corrupt intent, the jury may well have concluded that the extortion Aguon was convicted of under Counts Two and Three was evidence of her participation in the conspiracy under Count One.

That a close nexus exists between mail fraud and an underlying offense utilized as evidence of a scheme to defraud is further established by the United States government's own concession in *United States v. Levin*, 973 F.2d 463, 464 (6th Cir. 1992) where mail fraud

counts were similarly based on the same factual allegations as a series of counts of Medicare fraud. The court noted that "[t]he government has conceded that the false claims and mail fraud counts are legally dependent upon the Medicare fraud counts." *Levin* at 464.[5]

The ruling of the Tenth Circuit here is in direct conflict with the position of the Ninth Circuit in *Aguon*. What is clear from both decisions, however, is that no clear standard has been established for review of cases of this type. Certiorari should be granted in order for this Court to establish

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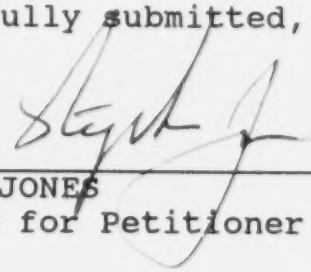
[5] This court has recognized the potential for error regarding one count to prejudice jury consideration of other counts. See Graves v. United States, 165 U.S. 323, 41 L.Ed. 732, (1897)(holding that failure of the court to instruct as to a good faith defense on several counts had a necessarily prejudicial effect on two other counts that were factually dependent on the counts where error was made).

the applicability of harmless error analysis to phases of trial which, although possibly not directly or obviously tied to error, are nonetheless affected by the error to the prejudice of the defendant.

CONCLUSION

For the reasons stated above, the petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this case on June 16, 1994.

Respectfully submitted,



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APPENDIX A - Reported Opinion United States v. Laughlin, 26 F.3d 1523 (10th Cir. 1994). Entered June 16, 1994.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 93-6049
	)	
SIDNEY C. LAUGHLIN,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CR-92-122-C)

Charles R. Lucus, Special Assistant United States Attorney, Oklahoma City, Oklahoma (John E. Green, United States Attorney, Oklahoma City, with him on the brief) for Plaintiff-Appellee.

Stephen Jones (Jeremy B. Lowrey with him on the brief), of Jones & Wyatt, Enid, Oklahoma for Defendant-Appellant.

BEFORE: ANDERSON, ENGEL, and KELLY, Circuit Judges

ENGEL, Senior Circuit Judge. The principal issues in this appeal are whether the trial court adequately instructed the jury with regard to the requisite *mens rea* for medicaid fraud and, if reversibly erroneous on that score, whether there was a spillover effect which fatally tainted the defendant's mail fraud convictions. While we are compelled to reverse the medicaid fraud convictions for failure to instruct on an essential element of the offense, we hold that the thoroughness and independence of the mail fraud instructions assured against any possible taint "spilling over" from the faulty medicaid fraud instructions.

I

Defendant Dr. Sidney Laughlin was charged in a fifty-seven count indictment with fifty-three counts of medicaid fraud, in violation

of 42 U.S.C. § 1320a-7b(a)(1)(i),[1] and with four counts of mail fraud, in violation of 18 U.S.C. § 1341.[2] A jury found him guilty on

---

[1] The statute reads, in pertinent part:

> (a) Whoever -
>
> knowingly or willfully makes or causes to be made any false statement or representation of material fact in any application for any benefit or payment under a State health care program . . . shall (i in the case of such a statement, [or] representation . . by any person in connection with furnishing (by that person) of items or services for which payment is or may be made under the program, be guilty of a felony . . .

[2] The statute reads, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or think whatever to be sent or delivered by the postal service, or takes or receives therefrom, any such matter or

fifty-two counts of medicaid fraud and all four counts of mail fraud. He appeals, arguing that: (1) the jury instructions for medicaid fraud were constitutionally defective in that they did not adequately inform the jury of the requisite *mens rea*, (2) the constitutional error in the medicaid instructions "spilled over" into the mail fraud convictions necessitating reversal of the mail fraud counts, (3) the evidence was insufficient to convict on certain specific medicaid fraud counts, (4) the trial court erred in its sentencing determination that Dr. Laughlin's fraudulent activity created a risk of serious bodily injury through the alleged scheme to defraud, and (5) the trial court erred in its sentencing calculation of loss for purposes of reimbursement.

> thing, or knowingly causes to be delivered by mail according to the discretion thereon . . . ."

Dr. Laughlin operated an obstetrics/gynecology clinic in Shawnee, Oklahoma. The allegations of medicaid fraud stem from claims for reimbursement for the treatment of six patients at this clinic. The charges are based on allegations that Dr. Laughlin fraudulently double-billed for related procedures, falsely claimed that a series of procedures were necessitated by "accidents at home," and fraudulently billed medicaid for other random procedures that he did not perform. The mail fraud charges relate to the alleged mailing of false claims to facilitate reimbursement for these procedures. All other relevant facts will be revealed at the appropriate time in this opinion.

II

Dr. Laughlin's first claim on appeal is that the trial court erred in not instructing the jury that he must either have known that

the claims being submitted were false or have submitted his claims with the intent to defraud or deceive. Because "knowledge of falsity" is a specific and necessary element of this offense, and because the jury was not instructed that it had to find this element in order to convict, we reverse Dr. Laughlin's fifty-two count medicaid fraud conviction.

Initially, we hold that in accordance with the Ninth Circuit in *United States v. Larm*, 824 F.2d 780 (9th Cir. 1987), "knowledge of falsity" is an essential element of medicaid fraud pursuant to 42 U.S.C. § 1320a-7b(a).[3] At oral argument, counsel for the government, in defining the elements of the offense, expressly, and we think properly, conceded that the defendant must not only have made false claims, but he must have known at

---

[3] As then Circuit Judge Kennedy stated: "It remains to be shown also that the Larm knew of the falsity, for an element of the crime is the specific intent to make a false statement." *Larm*, 824 F.2d at 783.

the time he was making such claims that they were, in fact, false.[4] The legislative history, to which we look to discern the *mens rea* for a specific offense, *Liparota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Bailey*, 444 U.S. 394, 406 (1979), supports the conclusion of the *Larm* court and the concession by the government. *See* H.R. REP. NO. 393, 95th Cong., 1st Sess., pt. II, at 47-48 (1977), *reprinted in* 1977 U.S.C.C.A.N.3039, 3050.[5] We therefore hold,

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[4] The following colloquy occurred during oral argument:

> JUDGE KELLY: Do you agree that the defendant had to know that the claim as made was false to opposed to merely knowing the claims were made?
>
> GOVERNMENT: Yes, Your Honor.

[5] The legislative history speaks in terms of an "intentional deception or misrepresentation" as the type of fraud that this statute seeks to combat, and of "practitioners that *choose to cheat*" as the type of practitioner who is at risk of running

in a question of first impression before this circuit, to be convicted of medicaid fraud, pursuant to 42 U.S.C. § 1320a-7b(a), a defendant must know that the claims being submitted are, in fact, false. We are left to decide whether the jury in our case, based on the actual instructions given, was capable of making such a finding. After a thorough review of the instructions, both oral and written, we are not confident that the jury either made or was capable of making this finding.

Over the objection of the defense, the trial court instructed the jury, both orally and in specific written instructions taken back to the jury room, as follows:

INSTRUCTION 11

MEDICAID FRAUD -- ESSENTIAL ELEMENTS

Three essential elements are required to be proved in order to

---

afoul of this law. H.R. REP. NO. 393, at 47-48 (emphasis added).

prove the offenses of medicaid fraud as charged in Counts 1-53 of the indictment:

> First: That the defendant made or caused to be made a statement or representation of material fact in an application for benefits or payment under the Medicaid Act;
>
> Second: That the statement or representation was false; and
>
> Third: That the defendant knowingly and willfully made or caused to made the false statement or representation.
>
> In order to convict the defendant, all 12 of you must agree that a material statement or representation in each count is in fact false.
>
> Unless the government has proved the same false statement to each of you, you must acquit the defendant of the charge in that particular count of the indictment.

The above charge was incomplete and insufficient because it failed to apprise the jury that the statement must not only be false

but that Dr. Laughlin must also have known that the statement was false when the claim was submitted. They jury, therefore, could have convicted Dr. Laughlin without considering whether he knew that the claims he was submitting were false.

A proper instruction could have been made simply by adding knowledge of falsity as a fourth element or appending knowledge of falsity to any one of the three cited elements in one of the following ways:

> First: That the defendant made or caused to be made a statement or representation of material fact in an application for benefits or payment under the Act *which he then and there knew to be false,* or
>
> Second: That the statement or representation was false *as the defendant knew,*[6] or

[6] We find *United States v. Irwin*, 654 F.2d 671 (10th Cir. 1981) *cert. denied*, 455 U.S. 1016 (1982), instructive in helping us to fashion this example. Defendant Irwin was

> Third: That the defendant knowingly and willfully caused to be made the false statement or representation *Knowing it to be false when he made the claim.*

Any such variation would have been fully adequate to apprise the jury of the *mens rea* element of the offense. The trial court could also have rectified the error by adding an additional independent instruction defining a false statement or representation in a manner similar to that elucidated in the above

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charged with violation 18 U.S.C. § 1001 and 18 U.S.C. § 1002 for "willfully and knowingly making or causing to be made a false statement as to material facts in the EDA grant application. . . ." *id.* at 675. The charge was derived from a statement that is very similar to the statue in question in our case. The Tenth Circuit held that "[t]he essential elements which the Government must prove in a false statement prosecution under Section 1001 are that (1) the defendant made a statement; (2) the statement was false, fictitious or fraudulent *as the defendant knew*; (3) the statement was made knowingly and willfully; (4) the statement was within the jurisdiction of the federal agency; and (5) the statement was material." *Id.* at 675-76 (emphasis added).

examples.[7]

The absence of a specific instruction of knowledge of falsity is in our judgment fatal. Failure to instruct on such an essential element as intent or knowledge requires reversal because the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 363 (1970). *See also Cole v. Young*, 817 F.2d 412, 424 n.8 (7th Cir. 1987) ("Indeed every federal court to consider the question since the Court decided *In Re Winship* . . . has agreed that a conviction procured without any jury instruction on an essential element of the offense is constitutionally invalid.").

Dr. Laughlin did not specifically request

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[7] These examples are, of course, not the only acceptable instructions, for numerous permutations will suffice; we merely offer several options for instructive purposes.

an instruction in any of the forms as listed above. Nonetheless he did object to the instruction as given and requested an instruction which stated that the jury could only convict if "the defendant knowingly and willfully made or caused to be made the false statement or representation with the specific intent to violate the law, or in the alternative, with the intent to violate the law." When this instruction was denied, he asked that the instruction with regard to the medicaid fraud counts mimic the instruction with regard to the mail fraud counts, so that the jury would be made aware that he had to "act with the specific intent to deceive."

The trial court rejected Dr. Laughlin's proffered instructions on the basis that a "specific intent" charge has been disfavored since *Liparota*, and that the essential elements of the crime, as listed in the instructions, when read in conjunction with

the definitions of "knowingly" and "willfully," were sufficient to apprise the jury of the correct *mens rea* for medicaid fraud.

The trial court was correct that instructing in terms of "specific intent" has been disfavored by the courts because of the confusing and ambiguous nature of such an instruction. *Liparota*, 471 U.S. at 433 n.16; *Bailey*, 444 U.S. at 403 (characterizing the distinction between general and specific intent as "ambigu[ous]" and as "the source of a good deal of confusion"); *United States v. Valencia*, 907 F.2d 671, 681-82 n.12 (7th Cir. 1990). In so recognizing, however, the trial court either misread or at least overextended *Liparota*, as not requiring any instruction whatever on the mental state required for a violation of medicaid fraud. *Liparota*, in qualifying the utility of the specific intent

instruction,[8] in no way relieved trial courts of their responsibility to define each element of the offense clearly and accurately.

All the same, the government insists that the essential *mens rea* element was unmistakably covered by the court's charges

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[8] *Liparota*, citing *United States v. Arambasich*, 597 F.2d 609, 613 (7th Cir. 1979), held that a "more useful instruction might relate specifically to the mental state required . . . and eschew use of difficult legal concepts like 'specific intent' and 'general intent.'" *See also United States v. Brown*, 739 F.2d 1136, 1143 (7th Cir.), *cert. denied* 469 U.S. 933 (1984). The idea of replacing specific or general intent instructions with instructions specifically tailored to the *mens rea* for the respective offense is consistent with the approach recommended by numerous circuits that have drafted pattern jury instructions. *See, e.g.*, FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 6.02 (1980) ("The Committee recommends avoiding instructions that distinguish between 'specific intent' and 'general intent' . . . . [and instead] recommends that instructions be given which define the precise mental state required by the particular offense charged."); PATTERN CRIMINAL JURY INSTRUCTIONS, U.S. SIXTH CIRCUIT § 2.07 (1991) ("This approach is consistent with the approach recommended by all of the circuits that have drafted pattern instructions.") (citations omitted).

elsewhere in the instructions. It is of course true that we review jury instructions in their entirety, *United States v. Denny*, 939 F.2d 1449, 1454 (10th Cir. 1991), under a *de novo* standard of review. *United States v. Agnew*, 931 F.2d 1397, 1407 (10th Cir. 1991). In so doing, we analyze, in light of the record, whether the instructions state the governing law and whether the jury was provided an intelligent, meaningful understanding of the applicable issues and standards. *United States v. Cardall*, 855 F.2d 656, 673 (10th Cir. 1989) (citations omitted). We reverse only if in the light of these considerations there was prejudicial error. *Id.* An analysis of the instructions in the form given convinces us that the jury could seriously have been misled in its understanding of the issues and law applicable to the case before it.

In a further attempt to define the *mens*

rea element, the trial judge instructed the jury that:

INSTRUCTION 2

"KNOWINGLY AND WILLFULLY" -- DEFINED

> A defendant acted "knowingly" when he was conscious and aware of his actions, realized what he was doing or what was happening around him, and did not act because of ignorance, mistake, or accident.
>
> A defendant acted "willfully" when he knowingly performed an act, deliberately and intentionally, as contrasted with accidentally, carelessly, or unintentionally.

This general definition of "knowingly and willfully," however, is not helpful if the jury is never adequately instructed what elements of the statue these terms modify. The jury here was never instructed what Dr. Laughlin had to know and may very well have been left with the same uncertainty that bothered the Supreme Court in *Liparota*. Commenting upon this disquieting ambiguity, Justice Brennan cited W. LAFAVE & A. SCOTT, CRIMINAL LAW § 27 (1972):

> "Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does 'knowingly' modify in a sentence from a 'blue sky' law criminal statute punishing one who 'knowingly sells a security without a permit' from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; *it is not at all clear how far down the sentence the word 'knowingly' is intended to travel--whether it modifies 'sells,' or 'sells a security,' or 'sells a security without a permit.'*"

Liparota, 471 U.S. at 424 n.7 (emphasis added).

On this record, we cannot confidently know whether the jury convicted Dr. Laughlin for: (1) knowing that he was making or causing claims to be made, or (2) knowing that the claims he was making or causing to be made were, in fact, false. *See Sandstrom v. Montana*, 442 U.S. 510, 526 (1979) ("[E]ven if

a jury *could* have ignored the presumption [as to intent] and found defendant guilty because he acted knowingly, we cannot be ceratin that this is what they *did* do.") (emphasis on original). Without such confidence, it would be grossly unfair to uphold Dr. Laughlin's conviction for medicaid fraud.

It is true that a review of the instructions, both oral and written, reveals that the indictment as sent to the jury in the written instructions contains an accurate description of the *mens rea* for the medicaid fraud.[9] This might persuade us to overlook

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[9] The indictment, on page two, states:

> That on or about the dates set forth hereinafter, in the Western District of Oklahoma, SIDNEY C. LAUGHLIN, the defendant herein, knowingly and wilfully made and caused to be made false statements and representations of material facts in applications for payments

the shortcomings of the medicaid fraud instructions. However, after careful consideration of the wording of the

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> of Medicaid funds for physician services in that the defendant, SIDNEY C. LAUGHLIN, stated and represented that he had provided specific physician services, identified in part by procedure code numbers, on the dates indicated, and that certain patients had accidents and injuries at home on the dates indicated, where SIDNEY C. LAUGHLIN, *the defendant herein, then and there well knew said statements and representations on the application forms submitted were false* in that the had not provided the physician services as described and identified by the procedure code numbers, on the dates stated, and that the patients did not have accidents and injuries at home on the dates stated, which misrepresentations were material. (emphasis added).

indictment, the context in which the indictment was received, and the absence of any other instruction corroborating or clarifying the *mens rea* element as it is contained in the indictment, the faulty jury instructions read as a whole remain glaringly deficient.

Unlike the remainder of the instructions, the indictment, although listed as Instruction 3, was not read verbatim to the jury but was summarized by the trial judge. This summary did not include the *mens rea* description. Thus, any arguably curative effect on the actual language in the indictment was minimized by the judge's instructions as given. The utility of the indictment was further qualified by the judge's statement that "the indictment itself is not evidence, it merely describes the charges and is only an accusation."

Even had the trial judge read the

indictment to the jury verbatim, it is our judgment that the inclusion of the knowledge of falsity element, embedded in the eighteen lines of text, reproduced in foot 9, *supra*, does not adequately remedy the judge's failure to incorporate the correct *mens rea* into the appropriate instructions.[10]

We cannot be confident that a reasonable juror, having read and heard the indictment, would have identified the contradiction, rectified it in a manner inconsistent with the judge's explicit "element" instructions, and determined that Dr. Laughlin was required to know that the statements he was submitting were, in fact, false. Again, without such confidence, we cannot affirm Dr. Laughlin's medicaid fraud convictions.

We hold that the trial judge committed

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[10] If anything, the existence of the correct *mens rea* merely points out how easy it would have been to instruct the jury on that same element.

prejudicial error with regard to the faulty jury instructions on medicaid fraud. The risk of misunderstanding is simply too substantial to be ignored. We thereby reverse Dr. Laughlin's convictions on counts 1-33 and 35-53.

III

Dr. Laughlin's next claim on appeal is that the error with regard to the jury instructions on the medicaid counts "spilled over" into the mail fraud counts, impermissibly tainting the mail fraud convictions pursuant to 18 U.S.C. §1341. Although three of the mail fraud counts were predicated on acts of medicaid fraud, we can identify no such spillover effect. The trial judge's instructions on mail fraud were complete in every particular including the requisite statutory *mens rea*. The jury was thus provided with an ample understanding of the applicable issues and standards, as

required by *United States v. Cardall*, 885 F.2d at 673. We do not believe that the absence of an element in the medicaid fraud instructions induced the jurors to abandon the independent and adequate mail fraud instructions they received.

The trial judge exercised great care in separating the instructions on the two distinct offenses. The jury were instructed that "[e]ach crime charged and the evidence applicable to it should be considered separately, and the *guilt or innocence of the defendant as to each count should be considered separately*." (emphasis added). We can be confident that the jury heeded instructions such as this because the jury, in considering the medicaid fraud counts, exercised their authority and dismissed one of the fifty-three medicaid fraud counts -- indicating, with some assurance, that the jury scrutinized each count separately and

distinctly.

It might even be logically argued that some of the instructions given on the mail fraud charges were so clear that the jury must perforce have been led to believe that the requirements to convict under mail fraud, including the *mens rea* element of intent to deceive or defraud, would apply to the fifty-three medicaid fraud counts. Again, however, because of their distinct treatment in the instructions, we believe it would be as improper for us to hold that the instructions on the first fifty-three counts were "cured" by the instructions on the last four as it would be to hold the opposite. Accordingly, the convictions of Dr. Laughlin on the four counts of mail fraud are affirmed.

IV

At sentencing, the trial court increased Dr. Laughlin's offense level two points, pursuant to U.S.S.G. §2F1.1(b)(4), for having

performed unnecessary surgical procedures, pursuant to a fraudulent double-billing scheme, which resulted in a "risk of serious bodily injury." This guideline provision deals solely with fraud and deceit offenses -- both mail fraud and medicaid fraud fall within the grasp of this enhancement provision. United States Sentencing Guideline § 2F1.1(b)(4) provides that:

> If the offense involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

The term serious bodily injury is defined in U.S.S.G. §1B1.1, comment. (n.1(j)):

> "Serious bodily injury" means injury involving extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. As used in the guidelines, the definition of this term is somewhat different than that used in various statutes.

The risk of "serious bodily injury"

identified by the district court pertains to unnecessary surgery performed on one patient in particular -- Tammy Mansfield. This unnecessary surgery formed the predicate act for one of the mail fraud convictions which we uphold today.

Dr. Laughlin chose to perform a tubal ligation (a sterilization procedure) on Tammy Mansfield four weeks after he delivered her child by caesarian section. Testimony at trial indicated that this choice was abnormal, as most doctors would have performed the sterilization procedure concurrently with the caesarian section. Subsequent and due, in part, to the second operation, Ms. Mansfield developed an ileus (distended abdomen) and had to be hospitalized a third time so that this condition could be treated. The development of the ileus can be traced, as even Dr. Laughlin admitted, to the unnecessary second operation.

Dr. Laughlin argued that the evidence was

performed this procedure several weeks following the caesarian section so that he could double-bill for surgical procedures. He points to Dr. Lampert's testimony, which, according to Dr. Laughlin, merely brought into question Dr. Laughlin's decision to wait four as opposed to six to eight weeks following the caesarian to do the tubal ligation. Dr. Laughlin argues that this testimony evidences only a disagreement concerning operation strategy, not a fundamental error with regard to appropriate procedure, and only proves that, at the very most, his decision might be controversial but in no way was designed to perpetrate a fraud.

The government draws a different conclusion from Dr. Lampert's testimony; it is a conclusion which under the totality of the evidence is supported by the greater force of

logic. The government points out that Dr. Lampert testified that: (1) normally a tubal ligation is performed at the same time as a caesarean section; (2) there was no medical reason not to have performed the procedure on Tammy Mansfield when the caesarian was done; and, (3) it would be difficult to find a doctor to defend Dr. Laughlin's actions with regard to his decision to wait before performing the related tubal ligation procedure.

According to further testimony by other witnesses, Dr. Laughlin was aware that he could not be paid twice if he performed the tubal ligation at the same time as the caesarian. Furthermore, Dr. Laughlin's reason for not concurrently performing the surgical procedure in question -- that he wanted to provide time for Tammy Mansfield to heal -- was called into question by Dr. Lampert who testified that Dr. Laughlin performed the

procedure at a time at which the caesarian could not have properly healed.

We are satisfied that the trial judge committed no error, and certainly no clear error, *United States v. Harris*, 903 F.2d 770, 778 (10th Cir. 1990), when she found that the second operative procedure was unnecessary and caused one of Dr. Laughlin's patients to develop an ileus, requiring a subsequent third trip to the hospital. The evidence was fully sufficient to permit the jury to find that Dr. Laughlin made the decision to postpone the tubal ligation pursuant to a fraudulent double-billing scheme which was facilitated by his use of the mails. Dr. Laughlin's fraudulent activity therefore caused a risk of serious bodily injury to Ms. Mansfield, and the trial court's decision to enhance his base offense level by two points should, therefore, be upheld pursuant to U.S.S.G. 2F1.1(b)(4).

For the foregoing reasons, the medicaid

fraud convictions are REVERSED and REMANDED for new trial or further proceedings consistent herewith. The mail fraud convictions are AFFIRMED.

93-6049, *United States v. Laughlin*

ANDERSON, Circuit Judge, dissenting.

I agree that 42 U.S.C. § 1320a-7b(a)(1) requires proof that Laughlin knew the statements were false. I dissent because the jury instructions as a whole correctly explained the meaning of "knowingly and willfully." See *United States v. Denny*, 939 F.2d 1449, 1454 (10th Cir. 1991) (explaining that court must review adequacy of jury instructions as a whole, rather than reviewing individual instructions separately).

I. Knowledge of Falsity

Contrary to Laughlin's assertion, the district court did not fail to instruct the jury on the knowledge of falsity requirement. Instruction Eleven identified "three essential elements" of Medicaid fraud:

> First: That the defendant made or caused to be made a statement or representation of material fact in an application for benefits or

payment under the Medicaid Act;

Second: That the statement or representation was false; and

Third: That the defendant knowingly and willfully made or caused to be made the false statement or representation.

Appellant's Br. App. at 88. Like the statute itself, however, the third element's description of the necessary intent was ambiguous. It could mean that Laughlin knowingly made a statement that happened to be false, even if he did not know it was false. Or it could mean that Laughlin knew that the statement he was making was false. See *Liparota v. United States*, 471 U.S. 419, 423-24 & n. 7 (1985).

The jury almost certainly understood the instruction correctly. The first element already required proof that Laughlin made or caused to be made a statement. I doubt that a jury would think one could make a statement without knowing that he was doing so.

"Knowingly" in the third element could only add the requirement that Laughlin knew the statement he was making was false.

Instruction Nine further guaranteed that the jury would correctly understand the intent element by defining "knowingly" as acting with awareness and not because of ignorance or mistake. See Appellant's Br. App. at 86. A reasonable juror would conclude that a defendant who intentionally made a statement but did not know it was false was acting in ignorance. Although plausible to lawyers, I doubt that any reasonable juror would think that a person who did not know his statement was false "knowingly made a false statement."

Nevertheless, our precedents do suggest that this technical ambiguity makes the intent instruction alone inadequate. See *United States v. O'Brien*, 686 F.2d 850, 851-53 (10th Cir. 1982); *Hunt v. Oklahoma*, 683 F.2d 1305, 1308 (10th Cir. 1982). But flaws in jury

instructions are only errors if the instructions as a whole do not "provide the jury with an ample understanding of the applicable principles of law and factual issues." *Denny*, 939 F.2d at 1454. The indictment contained in Instruction Three clarified the correct understanding of Instruction Eleven on the required knowledge of falsity. The indictment in Instruction Three states that

> Sidney C. Laughlin . . . knowingly and wilfully made and caused to be made false statements and representations of material facts in applications for payments of Medicaid funds for physician services in that the defendant . . . represented that he had provided specific physician services . . . and that certain patients had accidents and injuries at home . . . , whereas Sidney C. Laughlin, the defendant herein, then and there well knew said statements and representations on the applications forms submitted were false . . . .

Appellant's Br. app. at 67. Laughlin agreed to have the judge summarize the indictment rather than read it to the jury, but the judge

nevertheless told the jury to "read and review it carefully." R. Supp. at 4-5. The indictment can and in this case did help to explain the required intent. See *Hunt*, 683 F.2d at 1308 ("[T]he mere use of the word 'knowingly' in the Information and jury instructions did not adequately convey the concept of scienter to the jury."). The jury knew it should interpret each instruction in light of other instructions because the judge told the jury to "consider the instructions as a whole and not a part to the exclusion of the rest." R. Supp. at 13. Especially since the jury was likely to understand the intent instruction correctly, the indictment's clear allegation that Laughlin knew the statements were false was enough to ensure that the jury would understand it could convict Laughlin only if he knew the statements were false.

I don't see how the "utility of the indictment was further qualified by the

judge's statement that 'the indictment itself is not evidence, it merely describes the charges and is only an accusation.'" Majority Op. at 13. This is true of all instructions. None is "evidence"; they simply describe what the government must prove. The judge's remark does not suggest that the indictment may not clarify what the government must prove.

The majority concludes that Instruction Three did not sufficiently clarify the required knowledge of falsity because "[w]e cannot be confident that a reasonable juror, having read and heard the indictment, would have identified the contradiction, rectified it in a manner inconsistent with the judge's explicit 'element' instructions, and determined that Dr. Laughlin was required to know that the statements he was submitting were, in fact, false." Id. However, Instruction three did not contradict Instruction Eleven. Instruction Eleven

clearly required Laughlin to have known something when he made the false statements. One of the possible meanings--in fact, the most likely meaning--of the third element in Instruction Eleven was just what the indictment in Instruction Three alleged: that Laughlin knew his statements were false. Instruction Three therefore simply clarifies the ambiguity in Instruction Eleven; they do not conflict at all. The jury would have no reason to disregard Instruction Three and the judge's admonition to follow all of the instructions. See R. Supp. at 4.

The majority also suggests that the jury would not have correctly understood the knowledge requirement because the judge did not read the relevant part of the indictment, which was "embedded in eighteen lines of text." Majority Op. at 12-13. The mere density of an instruction does not make it inadequate. We may assume that the jury

followed the judge's instructions to read the indictment carefully, regardless of what he read orally. Instructions Three and Eleven, along with Instruction Nine, adequately informed the jury that Laughlin was guilty only if he knew the statements were false.

II. Willfullness

The statute requires proof that the defendant both "knowingly" and "willfully" made or caused to be made a false statement. 42 U.S.C. § 1320a-7b(a)(1). Laughlin claims that the court did not properly instruct the jury on the willfullness requirement either. The majority did not have to consider this challenge because it held that the court did not adequately instruct the jury on knowledge of falsity. I believe that the instructions did convey the correct understanding of the willfullness requirement.

I disagree with Laughlin that the

Medicaid fraud statute requires proof that the defendant intended to violate a known law. The accused generally need not know that his conduct is illegal. *Cheek v. United States*, 498 U.S. 192, 199 (1991); *United States v. Dashney*, 937 F.2d 532, 538 (10th Cir.), cert. denied, 112 S. Ct. 402 (1991). But in some cases, such as those involving the criminal tax laws, "willfully" means an "intentional violation of a known legal duty," because of the complexity of the laws or the apparent innocence of the criminal conduct. See *Cheek*, 498 U.S. at 199-201; *Dashney*, 937 F.2d at 539. In this case, however, making known false statements is not apparently innocent. The law may be somewhat complex, but the required knowledge of falsity itself ensures that the accused will not be convicted if he did not know the law and regulations well enough to know that his statements were false. The defendant need not know that filing false

claims is against the law, however. See *United States v. Hollis*, 971 F.2d 1441, 1451-52 (10th Cir. 1992) (holding that "willfully" in 18 U.S.C. §2(b) does not require that defendant knew his conduct violated the law), cert. denied, 113 S. Ct. 1580 (1993); *Dashney*, 937 F.2d at 538-39 (holding that "willfully" in antistructuring law means only that person intentionally and knowingly evaded the reporting requirement, not that he also knew evasion is illegal). He need only intend to make statements he knows are false.

The instructions ensured that the jury would not convict Laughlin unless he "willfully" made false statements in this sense. The instructions require the jury to find that Laughlin "knowingly and willfully made or caused to be made the false statement or representation." Appellant's Br. App. at 88. The court also explained that "willfully" means Laughlin "knowingly performed an act,

deliberately and intentionally, as contrasted with accidentally, carelessly, or unintentionally." Id. at 86. Again, the court's description of the willfullness requirement is technically ambiguous. It could mean only that Laughlin intended to make a statement, or that he intended to make a false statement. The required knowledge of falsity makes this ambiguity inconsequential, however. The instructions require that Laughlin knew the statements were false, and that he "willfully" or "intentionally" made those statements that he knew to be false. This is all that "willfully" means in this statute. The instructions as a whole thus adequately instructed the jury on the correct meaning of the charge that Laughlin "knowingly and willfully" made false statements. I therefore dissent.

APPENDIX B -- Judgment Entered June 16, 1993.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

(For Offenses Committed on or After November 1, 1987)

SIDNEY C. LAUGHLIN

Case No.: CR-92-122-C

(Name of Defendant)

Stephen Jones
Defendant's Attorney

THE DEFENDANT:

_____ pleaded guilty to count(s) _____

__X__ was found guilty on count(s) 1-33 and 35-57 of Indictment after plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Offense Title & Section	Count Nature of Offense	Date Offense Concluded	Count Number(s)
42:1320a 7b(a)(I)(i)	Fraud-made false stmts in applications for pymts of Medicaid funds for	11-27-90	1-33 35-53

physician
services.

18:1341 Postal Fraud 11-27-90 54-57

The Defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

__X_ The Defendant has been found not guilty on count(s) Thirty-four (34) of Indictment and is discharged as to such counts.

____ Count(s) _____ (is) (are) dismissed on the motion of the United States.

_X__ It is ordered that the defendant shall pay a special assessment of $50.00, for each count(s) 1-33, 35-57, totaling $2,950.00, which shall be due ___X__ immediately ____ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 444-46-9235

Defendant's Date of Birth: 10-12-51

February 5, 1993
Date of Imposition of Sentence

Defendant's Mailing Address:
1811 N. Beard

Shawnee, Oklahoma 74801

s/ /s Robin J. Cauthron
Signature of Judicial Officer

Robin J. Cauthron, U.S. District Judge
Name & Title of Judicial Officer

Defendant's Residence Address:
same

February 5, 1993
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of thirty-three (33) months on each of counts 1-33 and 35-57 all counts to run concurrently.

____ The court makes the following recommendations to the Bureau of Prisons:

____ The defendant is remanded to the custody of the United States marshal.

____ The defendant shall surrender to the United States marshal for this district.
____ at _____ on _____.
____ as notified by the United States marshal.

__x__ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
__x__ before noon on March 5, 1993.
____ as notified by the United States marshal.
____ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL
By DEPUTY MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years.

While on supervised release, the defendant shall no commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

_x_ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not possess a firearm or destructive device.

IT IS FURTHER ORDERED as special condition of supervised release, the defendant is ordered to perform 4 hours of community service per week, at the direction of the U.S. Probation Office, during the first year of supervision.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or the probation officer;

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptance reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other d substance, or any paraphernalia related to such substances, except as prescribed

by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE
RESTITUTION

__X__ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Department of Human Services	$50,000

Payments of restitution are to be made to:
_____ the United States Attorney for transfer to payee(s).
_____ the payee(s).

Restitution shall be paid:

__X__
in full immediately.
_____ in full not later than _____.
_____ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

_____ in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

_____ The defendant is ordered to forfeit the following property to the United States:

STATEMENT OF REASONS

____ The court adopts the factual findings and guideline application in the presentence report.

OR

__X__ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary) Paragraph 28 enhancement for obstruction removed; typographical error in paragraph 25 should read 2F1.1(b)(4).

Guideline Range Determined by the Court:

Total Offense Level: __18__

Criminal History Category: __I__

Imprisonment Range: __27__ to __33__ months

Supervised Release Range: __2__ to __3__ years

Fine Range: $6,000 to $60,000

__X__ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $50,000

__X__ Full restitution is not ordered for the following reason(s): The defendant's future earning capacity is uncertain, but can earn some income even if defendant does not

continue as a physician. Additional financial obligations preclude full payment of restitution.

_X_ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

____ The sentence is within the guideline range, that range exceed 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

____ upon motion of the government, as a result of defendant's substantial assistance.
____ for the following reason(s):

APPENDIX C -- Excerpts from Transcript -- District Court rulings on jury instructions. TR at 749,750,758,759

TR at 748-749:

MR GILE: Your Honor, I want to say one thing. It occurred to me a few minutes ago that I had not requested a specific intent instruction as I have, as I normally do. So I'm going to request one but I don't have one with me.

THE COURT: Certainly I believe you have to submit a proposed instruction to maintain your record. You may do that tomorrow morning before 9 o'clock. I will require that you do that. It is my position that a Supreme court case has not recommended but directed that we do away with the specific intent instructions and instead instruct as to state of mind which is in this set. "Knowingly and willfully" is defined in the proposed instructions. So, I believe you have to submit one for me to deny again.

MR. GILE: Okay. Maybe I can just take

your word for that as the law, Judge, and go on down the road.

THE COURT: So we will have a short record to make before argument tomorrow morning.

Mr. Lucas, did you have anything else or do you want --

TR at 758-759

MR AUTRY: Your Honor, in light of the fact that our requested instruction on specific intent has been denied, we would ask that the instruction on "Medicaid Fraud - Essential Elements" be slightly amended under the third element to include as follows: "That the defendant knowingly and willfully made or caused to be made the false statement or representation with the specific intent to violate the law or, in the alternative, with the intent to violate the law," because on rereading all these, we don't think that the elements as set out here sufficiently address the mens rea requirement or the intent requirement as contemplated by the statute.

THE COURT: When read in conjunction with the knowingly and willfully instruction which is included, I believe that it is completely accurate the way it is and I think what you propose here is more a matter for

argument.

MR. AUTRY: All right. I would note in addition that, Your Honor, on the "Scheme and Artifice to Defraud Defined" instruction, with respect to mail fraud, the instruction does state, "To act with intend to defraud means to act knowingly and with the specific intent to deceive," and then it goes on. We would ask that on the Medicaid fraud essential elements that something like that be added to that instruction.

THE COURT: Is that an additional request?

MR. AUTRY: No, it's the same request.

THE COURT: Okay.

MR. AUTRY: And, let's see. Finally, Your Honor, under the instruction on intent in the third paragraph where it says, "Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the observations of the human mind," we would

ask that that be amended to read intent to violate the law." That's in line with our other argument on the "Medicaid Fraud - Essential Elements" instruction.

THE COURT: Well, intent of any kind may not be proved directly. It's a correct statement of the law. I'm not going to change it.

MR. AUTRY: All right.

APPENDIX D -- Excerpts from Indictment - Counts 54, 55, 56, and 57

COUNT 54

1. The Grand Jury realleges and incorporates by reference all of the statements and allegations contained in Count 1, paragraph 1, 1(a) through 1(f), as though fully set forth herein.

2. At all times material to this Indictment and from at least September, 1989, and continuing thereafter until at least June, 1991, in Western District of Oklahoma, ***SIDNEY C. LAUGHLIN***, the defendant herein, devised and intended to devise a scheme and artifice to defraud the State of Oklahoma of its intangible right to have the Oklahoma Medicaid Program conducted honestly and to obtain money and property from the Oklahoma Medicaid Program by means of false and fraudulent pretenses, to defraud, so

devised and intended to be devised by the defendant, was in substance as follows:

(a) It was a part of the scheme and artifice to defraud that the defendant, **SIDNEY C. LAUGHLIN**, a provider of physician services under the Oklahoma Medicaid Program, would submit and cause to be submitted applications for payment to the Oklahoma Medicaid Program which he then knew contained the false and fraudulent pretenses and representations that patients had accidents and injuries at home on specific dates.

(b) It was a further part of the scheme and artifice to defraud that the defendant, SIDNEY C. LAUGHLIN, would submit applications for payment that he knew contained false and fraudulent pretenses and

representations that he had performed certain specifically identified physician services on specific dates when he knew that he had not performed these services on the dates stated and had not performed the services as described.

(c) It was a further part of the scheme and artifice to defraud that **SIDNEY C. LAUGHLIN** instructed his employees to put false and fraudulent representations on the applications for payment to indicate he had treated patients on three different days when he knew he had seen the patient only on one day, in an effort to secure payments that would otherwise have been denied.

(d) It was a further part of the scheme and artifice to defraud that **SIDNEY C. LAUGHLIN**, knowing that he was not

entitled to payment for procedure code 90020 if he also billed for global procedure codes 59400 and 59501, and knowingly and intending to bill for these global procedure codes, and having instructed his employees to so bill, also billed the Oklahoma Medicaid Program for procedure code 90020.

(e) It was a further part of the scheme and artifice to defraud that **SIDNEY C. LAUGHLIN**, knowing that he would receive less or no payment if he performed tubal ligation operations at the same time he performed Cesarean sections on the same patient, delayed performing the tubal ligations so that he could bill for them separately, knowing that he should have performed both operations at the same time.

(f) It was a further part of the scheme and artifice to defraud, and in an attempt to conceal his billing procedures, that **SIDNEY C. LAUGHLIN** instructed his employees to mail each of his applications for payment to the Oklahoma Medicaid Program in separate envelope so that the applications for payment, when received by the Oklahoma Medicaid Program, would be delivered and processed by several individuals instead of one, so that detection of his false and fraudulent billing procedures would be less likely.

3. That on or about June 22, 1990, in the Western District of Oklahoma, **SIDNEY C. LAUGHLIN**, the defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did cause to be placed in an

authorized mail depository to be sent and delivered by the U.S. Postal Service from Shawnee, Oklahoma to the Oklahoma Medicaid Program in Oklahoma City, Oklahoma, an envelope containing an application for payment for physician services allegedly provided to patient number C093658-02 on June 20, 1990, and June 21, 1990.

All in violation of Title 18, United States Code, Section 1341.

COUNT 55

1. The Grand Jury realleges and incorporates by reference herein all of the statements and allegations contained in Count 4, paragraph 1 and 2, including 2(a) through 2(f), as though fully set forth herein.

2. The Grand Jury further charges that on or about September 4, 1990, in the Western District of Oklahoma,

SIDNEY C. LAUGHLIN, the defendant herein, for the purposes of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did cause to be placed in an authorized mail depository to be sent and delivered by the U.S. Postal Service from Shawnee, Oklahoma, to the Oklahoma Medicaid Program in Oklahoma City, Oklahoma, an envelope containing an application for payment for physician services allegedly provided to patient number M222849-02 on August 28, 1990, August 29, 1990 and August 30, 1990.

All in violation of Title 18, United States Code, Section 1341.

COUNT 56

1. The Grand Jury realleges and incorporates by reference herein all

of the statements and allegations contained in Count 54, paragraphs 1 and 2, including 2(a) through 2(f), as though fully set forth herein.

2. The Grand Jury further charges that on or about October 11, 1990, in the Western District of Oklahoma, **SIDNEY C. LAUGHLIN**, the defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did cause to be placed in an authorized mail depository to be sent and delivered by the U.S. Postal Service from Shawnee, Oklahoma to the Oklahoma Medicaid Program in Oklahoma City, Oklahoma, an envelope containing an application for payment for physician services allegedly provided to patient number M222849-

02 on August 29, 1990.

All in violation of Title 18, United States Code, Section 1341.

COUNT 57

1. The Grand Jury realleges and incorporates by reference herein all of the statements and allegations contained in Count 54, paragraphs 1 and 2, including 2(a) through 2(f), as though fully set forth herein.

2. The Grand Jury further charges that on or about June 4, 1990, in the Western District of Oklahoma, **SIDNEY C. LAUGHLIN**, the defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did cause to be placed in an authorized mail depository to be sent and delivered by the U.S. Postal Service from Shawnee,

Oklahoma to the Oklahoma Medicaid Program in Oklahoma City, Oklahoma, an envelope containing an application for payment for physician services allegedly provided to patient number C050473-02 on June 1, 1990.

All in violation of Title 18, United States Code, Section 1341.